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BEFORE THE  
SURFACE TRANSPORTATION BOARD

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STB DOCKET NO. AB-156 (SUB-NO. 27X)

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DELAWARE AND HUDSON RAILWAY COMPANY, INC.  
-- DISCONTINUANCE OF TRackage RIGHTS EXEMPTION --  
IN BROOME COUNTY, NY; MIDDLESEX, ESSEX, UNION, SOMERSET, HUNTERDON,  
AND WARREN COUNTIES, NJ; LUZERNE, PERRY, YORK, LANCASTER,  
NORTHAMPTON, LEHIGH, CARBON, BERKS, MONTGOMERY, NORTHUMBERLAND,  
DAUPHIN, LEBANON, AND PHILADELPHIA COUNTIES, PA; CECIL, HARFORD,  
BALTIMORE, ANNE ARUNDEL, AND PRINCE GEORGE'S COUNTIES, MD; THE  
DISTRICT OF COLUMBIA; AND ARLINGTON COUNTY, VA

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REPLY TO NOTICE OF APPEAL

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Dated: June 2, 2015

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REPLY TO NOTICE OF APPEAL

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Delaware and Hudson Railway Company, Inc. ("D&H") submits this Reply in opposition to the Notice of Appeal filed by James Riffin ("Riffin") on May 18, 2015 challenging the Director of the Office of Proceedings' May 13, 2015 decision ("Director's Decision") denying Riffin's Petition to Revoke the Notice of Exemption. D&H opposes the Notice of Appeal on the grounds that Riffin has not satisfied the standard for appeal. In any event, the Director's Decision was a proper exercise of the authority delegated by the Board to the Director and was consistent with the statutory and regulatory intent and framework for class exemptions. Further, the technical deficiencies that Riffin identifies in D&H's Notice of Exemption were inadvertent and are not material. They neither render the Notice "false and misleading" nor do they otherwise affect the efficacy of notice to potentially interested parties. Lastly, Riffin's Petition to Revoke and his Notice of Appeal are both part of a sustained campaign by Riffin to subvert the Board's rules to inflict undue burden and delay on this transaction and on Norfolk Southern

Railway's ("NSR") acquisition of the D&H South lines in the hopes that D&H or NSR will give Riffin something to go away. Accordingly, Riffin's appeal is without merit and should be denied.

## **BACKGROUND**

On March 19, 2015, D&H filed its Notice of Exemption to discontinue approximately 670 miles of trackage rights in five states and the District of Columbia. Six hundred sixty miles of those trackage rights are overhead only and derived from two agreements with Conrail from the late 1970s authorized by the United States Railway Association's Final System Plan. D&H has not operated over the majority of the subject lines for nearly three years and, in many cases, for more than a decade. Indeed, segments of some of the lines over which D&H was granted rights in 1979 have been abandoned since the 1980s. Despite its understandable unfamiliarity with the current condition or location of a sizeable portion of the subject trackage, D&H undertook a good faith effort to painstakingly identify the approximately 200 ZIP Codes and more than 25 counties through which those lines traversed. D&H alerted all potentially interested parties of the forthcoming discontinuance proceeding with the notices provided by letter to all the parties required by the Board's regulations and by the legal advertisements published in nine newspapers that circulate in all the areas where the lines are (or were) located.

The Board published notice of D&H's exemption on April 8, 2015 with an effective date of May 8, 2015, which the Board later postponed to June 15, 2015 to coincide with the effective date of the transaction in Finance Docket No 35873.

On April 20, 2015, Riffin, who is neither a shipper nor a carrier, filed a petition to revoke the exemption, claiming that D&H had failed to include 19 ZIP Codes and three counties in its Notice. D&H filed a reply to Riffin's petition on May 8, 2015. In its reply, D&H acknowledged

that Riffin may have been correct with respect to 13 of the ZIP Codes he identified (the remaining codes were associated with P.O. boxes or located where D&H does not have trackage rights). Citing STB precedent in which the Board rejected a challenge to a notice of exemption in an abandonment proceeding notwithstanding the omission of 1 of 5 ZIP Codes, D&H argued that adequate notice had been provided to any interested shipper or connecting carrier, particularly since the key information in an overhead trackage rights discontinuance – the beginning and end points of the overhead trackage rights was accurately identified in the Notice. Further, D&H argued that substantial compliance with the Board’s regulations should not be overshadowed by minor technical omissions, particularly in view of the extensive amount of mileage involved, the years of inactivity, and the overhead nature of the rights at issue.

On May 13, 2015, the Office of Proceedings ordered D&H to submit a supplement to its March 19, 2015 Notice that includes all omitted information required by 49 C.F.R. § 1152.50 and placed the proceeding in abeyance until further order of the Board.<sup>1</sup>

On May 18, 2015, Riffin appealed the Director’s Decision, asserting that the March 19<sup>th</sup> Notice of Exemption contained “false and misleading” information mandating that the exemption be declared void *ab initio*. For the reasons discussed below, Riffin is wrong and his Appeal should be denied.

## **ARGUMENT**

### **I. Riffin Fails to Meet the Board’s Standard for Appeal of a Director’s Decision.**

The Board has delegated its authority to the Director of the Office of Proceedings with respect to, among other things, issuances of notices of exemptions and waivers from the

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<sup>1</sup> D&H is undertaking a comprehensive review to confirm that it has identified all applicable ZIP Codes and will be submitting its supplemental notice as soon as that review is complete.

requirements of 49 C.F.R. Part 1152 Subpart C. 49 C.F.R. § 1011.7(a)(2)(x) and (xiv). Decisions by the Director are subject to appeal under 49 C.F.R. § 1011.2(a)(7). “Appeals of initial decisions must be based on one or more of the following grounds: (1) that a necessary finding of fact is omitted, erroneous, or unsupported by substantial evidence of record; (2) that a necessary legal conclusion or finding is contrary to law, Board precedent, or policy; (3) that an important question of law, policy, or discretion is involved which is without governing precedent; and (4) that prejudicial error has occurred.” *N.Y. & Greenwood Lake Ry.—Feeder Line Acquisition—A line of Norfolk So. Ry. Co.*, Finance Docket No. 34649 (STB served July 27, 2005); *Chelsea Property Owners—Abandonment—Portion of the Consol. Rail Corp.’s West 30th Street Secondary Track in New York, NY*, Docket No. AB-167 (Sub-No. 1094)A (STB served June 13, 2005).

Here, the crux of Riffin’s appeal is that the Director (and the Board) lack discretion to allow D&H to supplement its Notice of Exemption to include inadvertently omitted information. Riffin challenges no finding of fact, legal conclusion or finding, and his appeal raises no important question of law, policy or discretion that is without governing precedent. Although Riffin challenges the exercise of discretion, that challenge raises neither an important question nor is the Director’s discretionary authority without governing precedent as the Board’s regulations plainly authorize the Director’s exercise of discretion. *See* 49 CFR 1011.7(a)(2). Lastly, Riffin alleges no prejudicial error, nor could he, as Riffin has no cognizable interest in this proceeding. Accordingly, Riffin’s appeal fails to meet the standard for consideration and should be denied on that basis alone.

## **II. The Director's Decision Was a Valid Exercise of Discretion and Consistent with the Regulatory Framework.**

Consistent with Congressional efforts to minimize needless burdens and delay in the regulatory process, the STB established the 2-year out-of-service class exemption. That class exemption is based on the Board's conclusion that: (1) continued regulation qualifying abandonments and discontinuances is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101; and (2) either (a) such transactions are of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power. *Exemption of Out of Service Rail Line*, 2 I.C.C.2d 146, 147, 155-56 (1986). In furtherance of the goal of reducing regulatory burden on entry and exit, the Board has delegated authority to the Director to issue Notices of Exemption and to further ease regulatory burdens where appropriate, *e.g.*, by waiving certain requirements including the provisions in 49 CFR Part 1152 Subpart C, which contains the notice provisions on which Riffin focuses. 49 C.F.R. § 1011.7(a)(2)(xiv) In exercising her delegated authority to require D&H to file a supplement to its Notice of Exemption, the Director was acting consistent with the Congressional goal of reducing needless regulatory burden.

There is no question that the subject trackage rights discontinuance qualifies for use of the class exemption. It is undisputed that D&H has moved no local traffic over any of the subject trackage rights in more than two years. Moreover, 660 miles of the trackage rights are overhead only (approximately 10 miles in Philadelphia Terminal area are local), many of which have not been used in more than a decade, and include some track segments that were previously abandoned or relocated by the host carrier.<sup>2</sup> Once the D&H South transaction is consummated,

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<sup>2</sup> D&H believes that it no longer has trackage rights over any of the line segments that have previously been abandoned but, out of an abundance of caution, will be including the associated ZIP Codes in its supplement to the Notice of Exemption.

all of the subject trackage rights will be disconnected from the remaining D&H system. In fact, the Board has already recognized that D&H is entitled to discontinue the subject trackage rights and to do so under the class exemption. *Norfolk So. Ry. Co.—Acquisition and Operation—Certain Rail Lines of the Del. and Hudson Ry. Co., Inc.* Finance Docket No. 35873, slip op. at 15-16 (STB served May 15, 2015).

Nor is there a genuine question as to the adequacy of D&H's Notice, which contained nearly 200 ZIP Codes. Pre-filing notices were published by newspapers of general circulation in all the ZIP Codes where the subject lines traverse including those omitted from the Notice. The Board previously found that omission of one of five ZIP Codes did not affect the efficacy of Notice since the newspaper publication covered the omitted ZIP Code. Significantly, that decision was in an abandonment proceeding where there were potentially affected shippers in the omitted ZIP Code. *See Buffalo & Pittsburgh R.R., Inc.—Abandonment Exemption—In Erie and Cattaraugus Counties, NY*, STB Docket No. AB-369 (Sub-No. 7X) (STB served Nov. 4, 2008). By contrast, there are no potentially affected shippers in the omitted ZIP Codes in this overhead trackage rights discontinuance proceeding.<sup>3</sup>

Under these circumstances, the wooden application of the Board's notice regulations is wholly unwarranted. Requiring D&H to restart the exemption process, as Riffin's Petition to Revoke sought, would merely have increased the regulatory burden in terms of both expense and delay without any offsetting benefit to the public. Importantly, the additional burden would not

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<sup>3</sup> While the Board's regulations call for inclusion of all ZIP Codes traversed by the subject trackage rights and require pre-filing notices to be published in newspapers circulating in those ZIP Codes, these requirements are of questionable value where overhead trackage rights are concerned because the discontinuing carrier is unable to serve shippers located in the intermediate ZIP Codes. The more important information for potentially interested parties is the end points of the overhead trackage rights, which D&H adequately identified here.

change the ultimate outcome of the exemption proceeding as D&H is clearly entitled to discontinuance authority under the class exemption.<sup>4</sup>

Accordingly, although D&H believes that even the supplemental filing the Director has required is unnecessary, it was well within the Director's discretion not to require D&H to begin anew.

### **III. Riffin's Claim that the Notice of Exemption is False and Misleading is Itself False and Misleading.**

According to Riffin, the Notice must be deemed void *ab initio* under the Board's rules because it contains false and misleading information. However, Riffin's argument is based on his mischaracterization of the verification contained in the Notice of Exemption. Specifically, Riffin claims that the Notice "declares under penalties of perjury" that it lists all of the ZIP Codes and counties the trackage rights traverse, provided notice of all of the ZIP Codes to the parties required by 49 C.F.R. § 1152.50(d), and published all of the ZIP Codes in its newspaper notices. However, D&H's sworn certification and verification is much more limited. In the verification executed by James Clements, Mr. Clements verifies under penalty of perjury only that:

- No local traffic has moved via D&H's trackage rights over the subject lines for at least two years;
- D&H's overhead traffic currently moving over the lines can be re-routed over other lines; and

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<sup>4</sup> Riffin's appeal also includes a confusing reference to the requirements of 49 C.F.R. Part 1105, which generally do not apply to a discontinuance proceeding. *See Union Pac. R.R. Co.—Discontinuance of Trackage Rights Exemption—In Alameda County, CA*, STB Docket No. AB-33 (Sub-No. 291X), slip op. at 2 n.4 (STB served April 8, 2010). Riffin also makes reference to certain track segments that were abandoned by other carriers but fails to explain any possible connection this may have for his appeal. The Board should disregard these wholly unsupported arguments.

- No formal complaint filed by a user of D&H's service on the subject lines (or a state or local government entity acting on behalf of such user) regarding cessation of service over the subject lines either is pending with the Board or any U.S. District Court or has been decided in favor of the complainant within the last two years.

Mr. Clements further states, "I have read the foregoing Notice of Exemption and know the contents thereof. I am informed and *believe that the matters stated therein are true* and, on that ground, I allege that the matters stated therein are true. I further certify that I am authorized to verify and file with the Surface Transportation Board the foregoing statement." (Emphasis added.) These statements were all true at the time of execution. While it was subsequently discovered that D&H inadvertently omitted from the Notice a small proportion of ZIP Codes and counties, that does not render Mr. Clements' verification false or misleading.<sup>5</sup>

More importantly, the inadvertently omitted information did not render the Notice itself false or misleading, nor did it affect the efficacy of D&H's notice to potentially affected shippers and other entities. None of the ZIP Codes that Riffin identified as omitted concern local trackage rights. Accordingly, no shipper or other potentially interested party is located in any of those omitted ZIP Codes. In any event, D&H published pre-filing notices in nine newspapers of general circulation covering in aggregate all areas in which the subject trackage rights traverse. The published notices provided more than sufficient information regarding the trackage rights to alert interested parties to the forthcoming discontinuance proceeding. Not a single objection or complaint has been raised in this proceeding from any shipper or other carrier concerning D&H's discontinuance of service. The omissions were at most harmless error. Accordingly, Riffin's

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<sup>5</sup> Likewise, neither D&H's Section 1152.50(d) nor newspaper publication certifications declare under penalty of perjury that all ZIP Codes and counties are included in the notices. Rather, the certifications simply state that the attached notices were provided and published.

claim that the exemption should be determined to be void *ab initio* is baseless and entirely without merit. The Board should deny Riffin's appeal of the Director's decision.

**IV. Riffin's Petition to Revoke and Notice of Appeal Constitute an Abuse and Misuse of the Board's Procedures.**

As the Board is well aware, Riffin has a long history of misusing the Board's rules and procedures for his own self-serving interests. Riffin's participation in this and the D&H South proceeding are no exception. As Riffin made abundantly clear in the settlement letter that he filed with the Board in the D&H South proceeding, his incessant and groundless filings and efforts to delay the proceedings are part of an overall campaign to force NSR and D&H to strike a deal with him to go away. *See Open Letter to the Surface Transportation Board and to the Parties of Record*, Finance Docket No. 35873, filed May 14, 2015.

If the D&H were to agree to transfer those trackage rights in dispute, to the Protestants that desire that those trackage rights be preserved, and if Norfolk Southern were to consent to the transfer of those trackage rights, in exchange for the Protestants waiving all of the procedural / technical errors, then everyone (except perhaps the unions), would support Norfolk Southern's Application, and would support the D&H's discontinuance of those trackage rights that no one had any interest in. . . . With full support, and no opposition, the Transaction could proceed on schedule. Everyone would be happy (at least they should be happy).

*Id.* at 5-6. The Board should not countenance such misconduct.<sup>6</sup>

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<sup>6</sup> NSR recently filed a petition for a rulemaking to help protect the integrity of the Board's processes against abusive litigants such as Mr. Riffin. *Petition of Norfolk So. Ry. Co. to Institute a Rulemaking Proceeding to Address Abuses of Board Processes*, STB Ex Parte No. 727. D&H is supportive of NSR's petition.

## CONCLUSION

For the foregoing reasons, D&H respectfully requests that the Board deny Riffin's appeal in all respects.

Respectfully submitted,

Dated: June 2, 2015

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**CERTIFICATE OF SERVICE**

I, David F. Rifkind, hereby certify that I transmitted a copy of the foregoing correspondence to the following parties by First Class United States mail and by e-mail where an e-mail address is included on the Board's official service list on this 2<sup>nd</sup> day of June 2015.

/s/ David F. Rifkind  
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